Supreme Court of Pennsylvania.

CALDWELL AND WIFE *v.* BROWN ET AL.

A master is not liable to a servant for injury received through the negligence of a fellow-servant.

This rule applies to the parents of a minor killed by negligence of a fellow-servant.

Persons in the same general employment, carrying out a common object under one master, are fellow-servants, although they may be employed in different branches of the occupation.

The measure of damages for the loss of a minor child by negligence, is the pecuniary value of the child's services while under age.

ERROR to Common Pleas of Armstrong county.

Fulton, for plaintiff in error.

Golden & Neale, and *Boggs*, for defendant in error.

The opinion of the court was delivered at Philadelphia, January 7th 1867, by

READ, J.—In *Gilman* v. *Eastern Railroad Corporation*, 10 Allen 233, Judge GRAY said: "The case presented by this report is to be determined by the application of rules now too well established to require an elaborate statement of the reasons on which they are founded, or an extended examination of the authorities by which they are supported.

"A servant, by entering into his master's service, assumes all the risks of that service which the master cannot control, including those arising from the negligence of his fellow-servants. In case of an injury to one servant by the negligence of another, it is immaterial whether he who causes, and he who sustains the injury, are or are not engaged in the same or similar labor, or in positions of equal grade or authority. If they are acting together, under one master, in carrying out a common object, they are fellow-servants. The master, indeed, is bound to use ordinary care in providing suitable structures, engines, tools and apparatus, and in selecting proper servants, and is liable to other servants in the same employment if they are injured by his own neglect of duty. But it makes no difference whether the master is an individual or a corporation, in either case he is responsible to his servants for his own negligence, but not for that of their fellow-servants."

The learned judge then cites the leading cases in his own state

and in New York, and the authoritative decisions in the House of Lords, as establishing this to be the law in England and Scotland and in two of the great commercial states of our union.

There are two late cases in the Exchequer Chamber, decided during 1865, affirming this doctrine in its fullest extent. In *Hall* v. *Johnson*, 34 L. J. Exch. Ch. 222, 3 H. & C. 589, ERLE, C. J., said: "We take the principle to be established, from a series of decisions in this empire and in America (decisions collected with great skill and clearness by Mr. Manley Smith in his book on Master and Servant), that where a laborer is damaged by the negligence of a fellow-laborer the master is not responsible:" Smith on Master and Servant, 2d ed., p. 134. And in *Morgan* v. *The Vale of Neath Railway Co.*, 35 L. J. Q. B. 23, 5 B. & S. 736, on appeal from the Court of Queen's Bench, the same doctrine is enunciated by Lord Chief Justice ERLE, and Lord Chief Baron POLLOCK delivering the unanimous opinion of the Exchequer Chamber. In this case the case of *Gilshannon* v. *The Stonybrook Railroad Corporation*, 10 Cushing's Rep. 228, is cited at some length, in a note. See also *Bottomly* v. *Brooks*, August 1866, *Nisi Prius*, by LUSH, J., and MARTIN, B., 15 Law Times Rep. N. S. 19; *Warburton* v. *Great Western Railway Co.*, 15 L. T. N. S. 361, Exch., decided 17th November 1866.

The same rule is laid down in all the late cases in the Court of Appeals of New York: *Coon* v. *Syracuse Railroad Co.*, 5 N. Y. 492; *Russell* v. *Hudson River Railroad Co.*, 17 N. Y. 134; *Sherman* v. *Syracuse & Rochester Railroad Co.*, Id. 153; *Boldt* v. *N. Y. Central Railroad Co.*, 18 N. Y. 432; *Wright* v. *Same*, 25 N. Y. 562.

And the commissioners of the Code, in their ninth report of the Civil Code of the state of New York, p. 307, § 1006, embody these authorities in that section: "An employer is not bound to indemnify the employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee."

This is the rule in Pennsylvania, as in many other states: *Ryan* v. *Cumberland Valley Railroad Co.*, 11 Harris 384; *Frazer* v. *Penna. Railroad Co.*, 2 Wright 104; *Catawissa Railroad*

Co. v. *Armstrong*, 13 Wright 194; *O'Donnell* v. *Allegheny Railroad Co.*, 14 Id. 490. See *Hayden* v. *Smithville Manufacturing Co.*, 29 Conn. 557; *Manville* v. *The Cleveland & Toledo Railroad Co.*, 11 Ohio, N. S. 417; *Illinois Central Railroad Co.* v. *Cox*, 21 Illinois 20; *Moss* v. *Johnson*, 22 Id. 633; *Ohio & Mississippi Railroad Co.* v. *Tindall*, 13 Indiana 366; *Wilson* v. *Madison, &c., Railroad Co.*, 18 Indiana 226.

The damages to be recovered in case of death by negligence are the pecuniary loss sustained by the parties entitled to maintain the action: *Penna. Railroad Co.* v. *Zebe*, 9 Casey 330; *Same* v. *Vandsver*, 12 Casey 298; *Same* v. *Catharine Henderson*, 1 P. F. Smith 315.

The first and fifth errors assigned arise from a misconception of the settled law of the land, that the master is not liable to an employee for the negligence of a co-employee; and, of course, that the parents of the deceased have no cause of action against the defendants for the loss of the services of their minor son upon that ground.

The deceased was a minor son of the plaintiffs, and worked at a large rolling-mill of the defendants, at a furnace assigned him, in close proximity to the boiler which furnished the motive power to run the nail factory. When the works started on the morning of the 9th December 1862, Daniel, the decedent, was at his post, as usual. They had gone, however, but a few minutes when this boiler exploded with fearful noise and violence. Several persons were injured, but Daniel was the only one killed. This action was brought against the owners of the mill by his parents. The first ground alleged to entitle them to recover we have already disposed of.

There was clearly no error in the answer to the third point, which is the first error assigned, nor in the answer to the fourth point, which is the second error assigned. So in the fourth error upon the subject of its being caused by the negligence of the party killed, it is clear the court were right in saying if such were the case there could be no recovery. The language quoted in this assignment of error is a general statement of the law, in the opening of the charge; but in justice to the court, the subsequent part of it applying it to the case in hand should have been also stated. "It has been faintly pressed by the defendants that the boy himself was guilty of such rashness and negligence to his own safety

as at least to bring him within the principle of concurring negligence in two particulars,"—the second of which was,—"that the fire in the heating furnace of the nail factory was under the control of the boy—was on that occasion excessive, and added to the danger.

"As to the second, the jury will decide how the fact was. It is probable that you may arrive at the conclusion that the fire in the heating furnace had nothing, or very trifling effect in causing the explosion. However, if you think you have evidence to satisfy you that it was partially the cause, and that the boy was thus in fault, plaintiff cannot recover. It seems to me the evidence is very slight to warrant the conclusion, but it is left to the jury." In all this, what have the plaintiffs to complain of?

It was argued by the plaintiff that the knowledge and acts of the manager or superintendent, were the knowledge and acts of the defendants, and the court so instructed the jury, and of this instruction no one except the defendants had any cause to complain. The court went, certainly, as far as they were asked to go, although there are authorities which do not seem to warrant it.

In *Albro* v. *Agawam Canal Company*, 6 Cush. 75, the proprietors of a manufacturing establishment were held not to be responsible to an operative in their employment for an injury sustained by him in consequence of an accident occasioned by the gross negligence and want of skill on the part of the superintendent of the works in a matter entirely under his control and management—he being a fit and proper person, and both being engaged in their proper duties at the time of the accident: and the superintendent himself was held not liable in *Albro* v. *Jacquith*, 4 Gray 99. In this last case both are considered as servants in the employment of the same master; in other words, co-employees.

The same rule, in broader terms, is laid down in *Wright* v. *N. Y. Central Railroad Co.*, 25 N. Y. 565, and above cited. "The rule exempting the master is the same, although the grades of the servants or employees are different, and the person injured is inferior in rank, and subject to the directions and general control of him by whose act the injury is caused." "Personal negligence (that of the master) is the gist of the action. It is not enough that the foreman and general superintendent of the work is guilty of negligence, causing injury to the subordinates."

In *Southcote* v. *Stanley*, 1 H. & N. 247, Lord Chief Baron POLLOCK said: "The rule applies to all the members of a domestic establishment; so that the master is not in general liable to a servant for injury resulting from the negligence of a fellow-servant; neither can one servant maintain an action against another for negligence, whilst engaged in their common employment."

And in *Morgan* v. *Vale of Neath Railway Co.*, above cited, the same learned judge said: "I am only desirous to add that it appears to me that if we were to decide this case in favor of the plaintiff we should open the gates to a flood of litigation. In every large manufactory where a number of workmen are employed in different departments of the same business, we should have it split up into any number of objects, although they all had the one common purpose. Thus in one manufactory the making of screws would be called one object and the doing woodwork another, and so on, and then a person employed in a superior department would be said to have nothing to do with the porter in the same establishment."

There was, therefore, no error of which the plaintiffs could complain, and that is all we need say on this point.

The third error is the answer to the plaintiff's tenth point, which is in these words:—That the measure of damages is not to be confined simply to what wages the deceased might have earned during his minority, but may also include the advantage of his society and assistance at home, out of active hours; and also the contingency of his remaining at home and laboring for his parents after he attained his majority, as well as the aid they might reasonably expect from him in their old age, even if he were married.

The Court answering, say:—"This point is answered in the negative. It is the pecuniary value of the services of the boy during his minority that can be recovered;" and in the charge,—"If the jury find for plaintiff, the measure of damages is simply the money value of the boy's services till he arrive at the age of twenty-one years. Plaintiffs are not to be allowed for the agonized feelings of parents, nor loss of his society."

This is clearly the law, and a proper answer to the instruction prayed for: *Penna. Railroad Co.* v. *Kelly*, 7 Casey 372; *Same* v. *Zebe*, 9 Id. 318; 13 Indiana 366.

The jury gave $200 damages, and we see no error of which the plaintiffs could complain. Judgment affirmed.